STATE OF WISCONSIN | CIRCUIT COURT BRANCH VII | BROWN COUNTY

LEONARD L. ALLARD,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF COMMERCE,

Respondent.

DECISION AND ORDER

Case No. 99 CV 1120

This matter is before the Court for judicial review of an administrative decision pursuant to §227.52, et. seq. The petitioner, Leonard L. Allard, seeks review of a decision by the Wisconsin Department of Commerce denying a claim submitted by the Petitioner pursuant to the Petroleum Environmental Cleanup Fund (PECFA) based on a determination that the claimant submitted a fraudulent claim which is a ground for denial of claims under §101.143 (4)(g), Stats.. That provision for a denial of claim has been in effect during all times material to this decision.

Allard's claim in the amount of Two Hundred Twenty-One Thousand Six Hundred Fifteen Dollars and Five Cents ($221,615.05) was denied on March 24, 1995 by the Department of Industry Labor and Human Relations. Appellant timely sought review pursuant to Chapter 227, Stats.. Since administration of the PECFA program had been transferred to the newly created Wisconsin Department of Commerce, the Secretary of that Department assigned Administrative Law Judge Karen L. Godshall to hear the matter and to issue a proposed decision. The matter was submitted, on stipulated facts and Ms. Godshall entered a proposed decision affirming the Department's decision of March 24, 1995. Ms. Godshall's decision was dated and mailed May 13, 1998. That decision was adopted by the Department of Commerce as its final decision on November 17, 1998. Appeal from that decision was taken but that appeal was subsequently dismissed by stipulation of the parties based upon an agreement that the case would be remanded back to the Administrative Law Judge for issuance of a new proposed decision applying the "clear and convincing" standard of proof. That agreement was generated by a memorandum decision from the Dane County Circuit Court, the Honorable P. Charles Jones presiding, in a case involving a similar factual situation, *Neuville v. Wisconsin Department of Commerce,* Dane County case number 98 CV 1102.

Ms. Godshall issued a second proposed decision in which she affirmed the Department's decision "as set forth in its original decision of March, 1995". Ms. Godshall stated in her proposed decision that "(T)he stipulated facts, and the inferences which must be drawn from them, clearly and convincingly establish that the claimant acted in reckless disregard of his obligation under the PECFA program and in so doing submitted a fraudulent claim." Ms. Godshall's decision was adopted as the final decision of the Department of Commerce by decision dated July 26, 1999. Judicial review was again timely sought pursuant to Chapter 227, Stats., and the matter is now before this Court for decision.

I conclude that the issue to be decided in this case is whether there is sufficient evidence in the record, considered as a whole, to establish by clear and convincing proof that Petitioner submitted a fraudulent claim. The Respondent argues that its decision under review is entitled to substantial deference. Petitioner argues that no deference is due, the decision of the agency which incorporates the proposed decision of the Administrative Law Judge. I conclude that the "substantial evidence" test enumerated in §227.57(6), Stats., is inapplicable. The parties have stipulated, and the law seems clear, that in circumstances where an agency is reviewing an issue of fraud the burden of proof is "clear and convincing", the middle burden of proof. Although the above-described section of Chapter 227 establishes the "substantial evidence" test, that statutory provision is inapposite to well settled case law. The Supreme Court in *Platon V. Department of Taxation,* 264 Wis. 254 (1952), in reviewing a determination of the Department of Taxation under Chapter 227 stated:

> "Inasmuch as these review proceedings are instituted under the Uniform Administrative Procedure Act, the provisions of sec, 227.20(l)(b), Stats., applies and the reviewing court may reverse or modify the decision of the board only if the same is 'unsupported by substantial evidence in view of the entire record as submitted.' The brief of the attorney general contends that substantial evidence 'in view of the entire record' requires that the reviewing court must apply the same substantial-evidence test in reviewing the record in this case as it would in the review of any other determination of an administrative agency. *With this contention we cannot agree because the intent of taxpayer to defeat or evade the tax must have been proved before the board by clear and convincing evidence. Therefore, 'substantial evidence in view of the entire record' in reviewing the board's finding of intent to evade tax must be evidence which is clear and convincing.* (Emphasis supplied)

> The Supreme Court went on, to cite, with approval, language from a federal case, *Duffin v.Lucas* (6th Cir. 1932), 55 Fed (2d)786, which states:
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> "In appropriate cases there is a presumption that the commissioner's action was rightful; but it is a fundamental rule of judicial procedure that fraud cannot be lightly inferred but must be established by clear and convincing proof....certainly, as we think, in a suit to recover back such a penalty, the general presumption that the commissioner was right has no evidential effect of itself sufficient to support a judgment affirming the penalty, its, effect being procedurally only; and the rule that a finding of fact by the judge in the district court will be affirmed by us if there is any substantial evidence to support it does not avail to sustain such finding of fraud *if we conclude that the proof relied upon is insufficient in law to be rightly regarded as clear, convincing and satisfying."* (Emphasis supplied)
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> This legal approach to review of agency decisions and circumstances where fraud is alleged is adopted in *Platon* at page 264 where the Supreme Court states "it is our considered judgment that there is sufficient evidence in the record., considered as a whole, to establish by clear and convincing proof that taxpayer did make incorrect income-tax returns...Clearly the Supreme Court reviewed the record to determine whether the proof relied upon was sufficient in law to be rightly regarded as clear, convincing and satisfying and that substantial deference in that regard was not granted to the decision of the trier of fact.

The Supreme Court does not, however, describe the methodology by which a reviewing court should review the record to determine whether the proof relied upon is insufficient in law to be rightly regarded as clear, convincing and satisfying. Since the language approved by the Supreme Court refers specifically to "proof relied upon", I conclude that the reviewing court should apply the same tests that are used in a review whether to sustain a verdict, that is, and paraphrasing, whether the evidence relied upon by the trier of fact when viewed in light most favorable to the decision of the trier of fact, is sufficient to establish fraud under the middle burden of proof, i.e., whether that evidence constitutes clear, satisfactory and convincing evidence of such fraud. In that regard, I conclude that it is not the proper role of the reviewing court to substitute its judgment for the judgment of the trier of fact. Rather, the review is an objective one requiring that the Court review the record and the proof relied on by the trier of fact in reaching its decision and determine whether that proof constitutes clear, satisfactory and convincing evidence.

The distinction between the two levels of burden of proof in civil cases can be somewhat' nebulous although the requirement that Wisconsin law maintain a middle burden of proof has been consistently

upheld by the Appellate Courts. Several attempts have been made to define those burdens of proof. The Supreme Court, in *Kuehn v. Kuehn,* 11 Wis. 2d 15, 26-27 (1960) stated,

> "In the class of cases involving fraud, of which undue influence is a specie, gross negligence, and civil actions involving criminal acts, the certitude must be of a greater degree than in ordinary civil cases, but need not be that degree necessary to find a conviction in criminal cases. In all three types of cases certitude must be reasonable, i.e., based on reasons. Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree. of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Applying those definitions, it appears that the trier of fact in applying the concept of the clear and convincing burden of proof may well have to arrive at such a degree of certitude which excludes the probability that a contrary conclusion may be true but not necessarily excludes a possibility, i.e., a reasonable doubt that the alternative or opposite conclusion may be true. In this case, the Administrative Law Judge, the. trier of fact, correctly stated that the burden was upon the Department to prove by clear and convincing evidence that the petitioner made a representation either knowing the representation to be untrue or with reckless disregard for the truth. That is an accurate and adequate statement of the law of fraud, or intentional misrepresentation. See Wisconsin Jury Instruction - Civil 2401. The trier of fact determined that the false representation made by petitioner in submitting his claim was not knowingly made by him. However, she also determined that the overall circumstances of the facts upon which she relied established that petitioner was a willing participant in an attempt to defraud the PECFA program. In that regard, the trier of fact cites knowledge of the fact that the contractor was paying or "fronting" the Five Thousand Dollar ($5,000.00) deductible payment which was the responsibility of the petitioner; the fact that fraudulent claims were included in the claim paperwork submitted by the petitioner which were known to be fraudulent by the contractor although the petitioner had no actual knowledge of such fraudulent claims; the, fact that in a subsequent John Doe proceeding, the petitioner denied that the

contractor had, in effect, reimbursed him the Five Thousand Dollar ($5,000.00) deductible amount and that petitioner was thereafter charged with, and convicted of, perjury. The trier of fact accepted the stipulated facts, and drew inferences from those facts and determined that the claimant acted in reckless disregard of his obligations under the PECFA program and that the evidence clearly and convincingly established that fact.

In reviewing the entire record, including the stipulation of the parties, and the exhibits, which I deemed necessary in order to review not only the proof relied upon, but also the proof not relied upon by the trier of fact, I was struck by the lack of certain evidence. Nowhere in the stipulation or the exhibits is there evidence of the date upon which the claim was submitted to the Department. It is clear from the stipulation that the petitioner received Five Thousand Dollars ($5,000.00) from the contractor, that he followed the contractor's instructions to deposit that amount in his checking account by two (2) separate deposits made several days apart, that he received a loan in order to pay for the eligible expenses before submitting his claim, that the claim was submitted and that, after some unspecified period of time, he testified at a John Doe proceeding and perjured himself concerning the source of the Five Thousand Dollar ($5,000.00) deductible payment. Although a transcript of petitioner's testimony at the criminal trial of the contractors was included as an exhibit, that transcript only verifies the fact that petitioner perjured himself sometime after filing the claim. He was not asked, nor did he volunteer, why he perjured himself, whether he had any guilty knowledge concerning the unusual circumstances of the contractor's fronting his deductible expense (although it should be noted that such circumstances were not illegal under §101.143, Stats. at the time the amount was paid) or whether he may have received some subsequent information which put him in fear of testifying truthfully at the John Doe proceeding. The Administrative Law Judge, as sometimes occurs with courts and juries, was therefore left to draw inferences from the circumstantial evidence notwithstanding the fact that some unknown facts may have existed which could have countered those inferences. The fact that the evidence was not presented, however, does not prohibit drawing appropriate inferences from the circumstantial evidence that did exist in the record.

The Wisconsin Rules of Evidence permit a trier of fact to consider circumstantial evidence. A fact may be proved indirectly by other facts or circumstances, from which it usually and reasonably follows according to human experience. Triers of fact are permitted to give such weight to circumstantial evidence as they believe it deserves. The indirect proving of a fact from other facts or circumstances is inferential. In this case, the trier of fact inferred from the fact of a subsequent act of perjury without an explanation of any intervening reason or cause for that perjury, the circumstances involving the unusual method of payment by the contractor to the petitioner and his failure to anywhere disclose those circumstances, raised an inference that he should have known that the claim which he filed may have contained fraudulent requests for reimbursement sufficient to make the contractor whole, and that his failure to review such documentation or make inquiry constituted a reckless disregard for the truth or falsity of his submitted claim. Such an inference is permissible. The Supreme Court, in describing the inferential establishment of facts by circumstantial evidence stated, in *Krause v. Milwaukee Mutual Insurance Company,* 44 Wis. 2d 590,602 (1969):

> "However, even though certain facts do not have the dignity of a presumption, they still have evidentiary consequence upon which a jury could base its findings."
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> "...So, proof of insanity or insolvency at a particular time, is not incompetent to prove, on the principle of natural and probable relation, the same condition a considerable period prior thereto. But the question of whether a circumstance is of sufficient probative force to have the dignity of a legal presumption of fact, establishing the matter in controversy, *prima facie,* as in case of the rule stated, is one thing, and that of whether it is so utterly void of probative power as to be outside the realms of competency and so irrelevant, is quite another.
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> "It must be conceded that while evidence of the character of that in question might not establish a condition which would raise a legal presumption running backward, if the condition were not too remote., it would not be' entirely without evidentiary consequence. Such consequence might be considerable under some circumstances..." *Ellis v. State* (1909), 138 Wis. 513, 524, 525, 119 N.W. 1110.

The evidence which was relied upon by the trier of fact in this case may not have been sufficient to convict the petitioner of criminal conduct. But it is my considered judgment that the evidence in the record, relied upon by the trier of fact, exceeds the ordinary burden of proof under Wisconsin law.

Applying the definitions from *Kuehn, supra,* the evidence, considered as a whole, is sufficient to establish by clear and convincing proof that the conduct of petitioner in submitting the claim was done recklessly, without caring whether it was true or false.

On the basis of the foregoing,

IT IS HEREBY ORDERED that the decision of the Department of Commerce is affirmed.

Dated this 19th day of April, 2000.

BY THE COURT:

Richard J. Dietz
Circuit Judge, Bran VII

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